72-1330 FILE COPY

APR 2 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1330

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

versus

LOUELLA S. Da'VILLE, Individually and as Natural Tutrix of the Minor, Peyton Renee Da'Ville,

R. S. WISE, ROY RAWLS and PACIFIC INDEMNITY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

V. Farley Sonnier
Davidson, Meaux, Onebane & Donohoe
P. O. Drawer 3507
Lafayette, Louisiana 70501
Phone 318—233-2111

Attorney for Petitioner,
Insurance Company of North America

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No.

LOUELLA S. Da'VILLE, Individually and as Natural Tutrix of the Minor, Peyton Renee Da'Ville,
Plaintiff-Appellant,

INSURANCE COMPANY OF NORTH AMERICA,
Intervenor-Appellant,

versus

R. S. WISE, ROY RAWLS and PACIFIC INDEMNITY COMPANY,
Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, INSURANCE COMPANY OF NORTH AMERICA, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on January 2, 1973. The appellate decision affirmed the decision of the Lower Court.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was handed down on January 2, 1973. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

As more fully shown in the writ application made on behalf of Louella S. Da'Ville, Individually and as Natural Tutrix of the Minor, Peyton Renee Da'Ville, the action is one for death of Charles Da'Ville, an employee of Movible Offshore, Inc. The decedent's widow, sued individually and as administratrix of the infant child under Title 28, U.S.C. Section 1331 (A) and Title 43, U.S.C. Section 1333 (the Outer Continental Shelf Lands Act) for damages for Da'Ville's wrongful death. Made defendants were: (A) Pacific Indemnity Company as the liability insurer of Movible Offshore and (B) Da'Ville's co-employees from Movible Offshore, Wise, a toolpusher, and Rawls, a driller.

Your petitioner, The Insurance Company of North America, was Movible Offshore's compensation carrier and intervened into the action to recover from Pacific Indemnity all amounts paid and required to be paid by it to the widow and child under the Longshoremen's and Harbor Workers' Compensation Act, Title 33, U.S.C. Section 901, et seq.

The writ application on behalf of the widow and dependent infant child has been or will shortly be filed in this Court.

Intervenor, Insurance Company of North America, reiterates all statements of fact, arguments, conclusions made in the said writ application mentioned aforesaid and copies them *in extenso* herein.

CONCLUSION

For the reasons set forth in the principal writ application filed on behalf of the widow and dependent child, intervenor prays that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

DAVIDSON, MEAUX, ONEBANE & DONOHOE
P. O. Drawer 3507
Lafayette, Louisiana 70501

By: _____
V. FARLEY SONNIER
COUNSEL FOR PETITIONER

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Petition has been forwarded to all attorneys of record by depositing a copy of the same in the United States Mail, postage prepaid and properly addressed to said attorneys.

Lafayette, Louisana, this _____ day of March, 1973.

_____
V. FARLEY SONNIER

FILE COPY

FILED
JUN 14 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1339

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

versus

R. S. WISE, ET AL,
Respondent.

No. 72-6477

LOUELLA S. Da'VILLE,
Petitioner,

versus

R. S. WISE, ET AL,
Respondent.

REPLY BRIEF ON BEHALF OF R. S. WISE, ROY RAWLS AND PACIFIC INDEMNITY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. GERALD GAUDET
VOORHIES & LABBE
Post Office Box 3527
Lafayette, Louisiana 70501

By: H. Lee Leonard
Attorneys for R. S. Wise,
Roy Rawls and
Pacific Indemnity Company

INDEX

Page

STATEMENT OF THE CASE 2

ISSUES PRESENTED FOR REVIEW 3

ARGUMENT 4

CONCLUSION 26

CERTIFICATE 27

TABLE OF AUTHORITIES

Cases:

Adams v. Fidelity & Casualty Co. of New York, 107 So.2d 496 (La. App. 1958) 7

Alcoa S.S. Co. v. Charles Ferran & Co., 251 F. Supp 823 (1966) 10

Alcoa S.S. Co. v. Charles Ferran & Co., 443 F. 2d 250 (5 Cir. 1971) 10

Continental Oil Company v. London Steamship Owners Mutual Insurance Association, 417 S.2d 1030 ..... 21, 22

Dandridge v. Fidelity & Casualty Co. of New York, 192 So. 887 (1939) 10, 11, 12, 13, 14, 15, 17

Finn v. Employers' Liability Assurance Corporation, 141 So.2d 852 (1962) 23

Hughes v. Chitty, 383 F. Supp. 734, affirmed 415 F.2d 1150 (5th Cir. 1969) 5, 25, 26

Nations v. Morris, 331 F. Supp. 771 (1971) 5

Olympic Towing Corp. v. Nobel Towing Company, 419 F.2d 230 (1969) 10

AUTHORITIES (continued)

Page

Webb v. Zurich Insurance Company, 205 So.2d 398 ..... 18, 19, 21

Other Authorities:

Longshoremen's & Harbor Workers Compensation Act, 33 U.S.C.A. 933(i) 4, 7, 9, 17, 25

Louisiana Direct Action Statute, Revised Statute 22:655 ..... 18, 19

Title 33, U. S. C. A. Section 1333, the Submerged Lands Act 20

United States Code Congressional and Administrative News, 86 Congress, 1st Session, 1959, Volume 2, at page 2134 8

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 72-1339

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

versus

R. S. WISE, ET AL,
Respondent.

No. 72-6477

LOUELLA S. Da'VILLE,
Petitioner,

versus

R. S. WISE, ET AL,
Respondent.

REPLY BRIEF ON BEHALF OF R. S. WISE, ROY RAWLS AND PACIFIC INDEMNITY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

Petitioner, Louella S. Da'Ville, widow of Charles Da'Ville, filed a complaint against defendants, R. S. Wise, Roy Rawls and Pacific Indemnity Company, in tort for the alleged wrongful death of her husband, Charles Da'Ville. At the time of his death, Charles Da'Ville was employed by Movible Offshore, Inc. and was working upon an artificial island or fixed structure situated on the Outer Continental Shelf located in the Gulf of Mexico within the seaward extention of the boundaries of the State of Louisiana. Da'Ville's employer was Movible Offshore, Inc. and defendants, R. S. Wise and Roy Rawls were co-employees of Da'Ville with Movible Offshore, Inc. Pacific Indemnity Company is the public liability insurer of Movible Offshore, Inc. Accordingly, the instant suit involves a claim between co-employees and the public liability insurer of the employer of claimant's deceased husband.

Defendants, R. S. Wise, Roy Rawls and Pacific Indemnity Company, filed a motion for summary judgment premised primarily upon the fact that the Outer Continental Shelf Lands Act granted unto claimant in the instant case the exclusive remedy of compensation benefits as to not only Movible Offshore, claimant's deceased husband's employer, but also as to the co-employees, whose negligence is complained of, R. S. Wise and Roy Rawls, as well as Pacific Indemnity. Defendants' motion for summary judgment was sus-

tained by the United States District Court in and for the Western District of Louisiana, Opelousas Division, on December 3, 1971. Petitioner subsequently filed a notice of appeal from the judgment of the District Court dismissing her suit and perfected an appeal in the United States Court of Appeal for the Fifth Circuit. On January 2, 1973, a judgment was entered by the Fifth Circuit Court of Appeal affirming the District Court's granting of defendants' motion for summary judgment. Plaintiff has abandoned her claim against R. S. Wise and Roy Rawls, leaving only Pacific Indemnity as a party-defendant.

ISSUES PRESENTED FOR REVIEW

I.

DOES THE LONGSHOREMEN'S & HARBOR WORKERS COMPENSATION ACT, WHICH IS ADOPTED INTO THE OUTER CONTINENTAL SHELF LAND ACT, GRANT UNTO AN INJURED EMPLOYEE OR HIS LEGAL REPRESENTATIVE, IF HE IS KILLED, A CAUSE OF ACTION IN TORT AGAINST THE LIABILITY INSURER OF HIS EMPLOYER?

II.

DOES THE LOUISIANA DIRECT ACTION STATUTE APPLY IN A CASE WHICH ARISES UNDER THE PROVISIONS OF THE OUTER CONTINENTAL SHELF LAND ACT?

III.

DOES THE LIABILITY INSURANCE POLICY ISSUED BY PACIFIC INDEMNITY COMPANY TO MOVIBLE OFFSHORE, INC. EXCLUDE COVERAGE FOR THE CLAIM OF PETITIONER IN THE INSTANT CASE?

ARGUMENT

I.

The Longshoremen's & Harbor Workers Compensation Act, which is adopted into the Outer Continental Shelf Lands Act, grants to an injured employee or his legal representative, if he is killed, the right to compensation benefits, which are the exclusive remedy against his employer, co-employees and the liability insurer of his employer.

The Longshoremen's & Harbor Workers Compensation Act, 33 U.S.C.A. 933(i) provides as follows:

> "The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: provided, that this provision shall not effect the liability of a person other than an officer or employee of the employer."

Pursuant to the above cited statute, it is clear that the co-employees of Mr. Da'Ville, claimant's deceased husband, are not subject to suit. The cases of *Hughes v. Chitty,* 383 F.Supp. 734, affirmed 415 F.2d 1150 (5 Cir.-1969) and *Nations v. Morris,* 331 F.Supp. 771 (1971), pending on appeal, further supports the above conclusion. The District Court in the *Nations* case, supra, considered the identical question presented in the instant case and specifically held as follows:

> "Whether American Motorist can share in the immunity granted to co-workers by reason of the exclusive liability provisions of the LHWCA depends on whether the immunity of the insured is a personal defense of the insured. Because of the Louisiana direct action statute, L.S.A.-R.S. 22:655, the insured and the insurer become co-debtors *in solido,* Louisiana civil code Article 2098 sets forth the defenses available to debtors *in solido:*
>
> 'Art. 2089. A co-debtor *in solido,* being sued by the creditor, may plead all the exceptions resulting from the nature of the obligation, and all such as are personal to himself, as well as such as are common to all the co-debtors.
>
> 'He cannot plead such exception as are merely personal to some of the co-debtors.'
>
> "Thus, the insurer can assert (1) a defense personal to itself (as coverage in the compre-

hensive policy); (2) a defense common to all of the co-debtors; and (3) a defense resulting from the nature of the obligation (as contributory negligence). The insurer cannot assert personal defenses of the insured. Those defenses traditionally considered personal to the insured are infancy, coverture, charitable immunity, governmental immunity, lunacy and bankruptcy. (Cf., footnote 9, Alcoa Steamship Co. v. Chas. Ferran & Co., 443 F.2d 250 (5 Cir.-1971))."

* * *

"In resolving the question whether the immunity of a co-worker from common-law suit should be extended to the insurer, the theory of the compensation legislation should be considered. The entire purpose was to (1) insure that the injured worker would receive speedy and sure monetary compensation without resort to finding liability based on fault and (2) limit the employer's liability only to compensation and make him immune from common-law suits. The employer discharges this liability by obtaining insurance.

"In any industry in Louisiana, especially offshore oil, any insurance coverage for managing employees is provided and paid by the *employers*. The reason this coverage is obtained is because under the Louisiana Compensation Statute, as interpreted, fellow employees are

third party subject to suit. *Adams v. Fidelity & Casualty Co. of New York,* 107 So.2d 496 (La. App. 1958). According to Malone, Louisiana Workmen's Compensation, Section 366, fellow employees are usually considered to be third persons subject to suit except in those jurisdictions where the compensation act expressly confers the employer's immunity upon all co-employees. One such jurisdiction is New York, whose compensation statute was the model of the Longshoremen Act. This provision is 33 U.S.C. Sec. 933(i) of the Longshoremen Act.

"It becomes obvious in considering the LHWCA, the employer's limitation of liability, one half of the legislative bargain, would be an empty phrase if the employer would be required to maintain insurance for his 'managining employees' to provide unlimited recovery in common-law damage suits brought by other employees. The employer's liability is limited by the statute to compensation payments. The employer operating under the LHWCA has no duty either by statute, common law or good business reasons to provide and maintain liability insurance for the tortuous acts committed by one of its employees against another employee, even though the same employer, operating under the Louisiana Compensation Act would obtain insurance.

"To hold otherwise would be to strain the intent and purpose of this federal statute. The

court holds the immunity of the co-worker from a common-law suit instituted by another co-worker to be a substantive non-personal defense which goes to the nature of the obligation. This immunity defense is one that can be pleaded by insurer." 331 F.Supp. 773-776

Additionally, the legislative history of the Longshoremen's & Harbor Workers Compensation Act makes it abundantly clear that the issue under consideration by this Honorable Court involves not a mere right but a cause of action that has been abolished insofar as suits against an injured claimant's employer and co-employees are concerned. In accord with this position, we respectfully direct the Court's attention to the United States Code Congressional and Administrative News, 86 Congress, First Session, 1959, Volume 2, at page 2134, which provides as follows:

"Like other workmen's compensation laws the Longshoremen's & Harbor Workers Compensation Act involves a relinquishment of certain legal rights by the employees in return for a similar surrender of rights by employers. Employees are assured hospital and medical care and subsistence during convalescence. Employers are assured that regardless of fault their liability to an injured workmen is limited under the act. In some instances injury to an employee is caused by a third party. In such circumstances, Section 33 of the act reserves to the employee the right to seek damages against the third party."

Then, in discussing "immunization of a fellow employees" to recovery by an injured employee, the legislative history states:

> "It simply means that rights and liabilities arising within the 'employee family' will be settled within the framework of the Longshoremen's & Harbor Workers Compensation Act."

We respectfully submit that it is obvious from the above quoted legislative history that the entire concept of the compensation act is a redefinition of rights and causes of action within the "compensation family".

There is yet another reason why Section 933(i) of the Longshoremen's & Harbor Workers Act necessarily includes the liability insurer of the employer as being immune from suit by injured co-employees. Section 933(b) of the act provides as follows:

> "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all rights of the persons entitled to compensation to recover damages against third persons unless such persons shall commence an action against such third party within six months after such award."

Pursuant to this provision, the employer who had paid Longshoremen's & Harbor Workers benefits under an award and compensation filed by the commissioner is assigned the rights of the injured party against third

persons, who may have negligently caused the injury. If petitioner's contention were maintained in the instant case, this would present the anomalous situation of an employer suing his own insurer, which might cover employees of the employer, while the employer is paying premiums under retrospective plans to the insurer. It suffices to say that this clearly was not the intent of Congress in enacting Section 933 of the Act.

It is readily apparent after reviewing petitioner's application for writs to this Honorable Court that the thrust of his argument is premised on the legal distinction between a personal defense and one common to the nature of the obligation and common to all co-debtors. Petitioner's discussion of *Alcoa S.S. Co. v. Charles Ferran & Co.*, 251 F.Supp. 823 (1966); *Olympic Towing Corp. v. Nobel Towing Company*, 419 F.2d 230 (1969) and *Alcoa S.S. Co. v. Charles Ferran & Company*, 443 F.2d 250 (5 Cir.-1971), attempts to draw an analogy between these decisions and the case at bar. We respectfully submit that these decisions are not analogous with the instant case, with the exception of *Alcoa S.S. Company v. Charles Ferran & Company, supra.*

There is one Louisiana case, which we respectfully submit affirmatively distinguishes between a defense personal to an insured and one common to an insured and his insurer. In this regard, we respectfully direct the Court's attention to the case of *Dandridge v. Fidelity & Casualty Company of New York*, 192 So. 887 (1939). In the *Dandridge* case, supra, the Second Circuit Court of Appeal for the State of Louisiana con-

sidered the question the exclusive remedy of the Louisiana Workmen's Compensation Act is a defense purely personal to the insured are also available to the liability insurer of an employer. After reviewing the Louisiana decisions holding that parents, children, husbands, wives, government units, charitable organizations, bankrupts, lunatics, interdicts, vessel owners, and alike possess defense of immunity, which are denied their respective liability insurers, the court in *Dandridge* went on to hold that the immunity against tort actions imbodied in the Louisiana Workmen's Law insofar as employers are concerned was likewise available to the liability insurers of employers. In reaching this conclusion, the court in *Dandridge*, supra, stated as follows:

> "Since plaintiff has presented argument only on her second contention, we shall limit our discussion to it. However, we see no merit in the first proposition presented. As we view it, the only question for determination is whether or not the defense successfully urged in its behalf by the assured, United Gas Company, was personal to it. In the case of Edwards v. Royal Indemnity Co., 182 La. 171, 161 So. 191, 194, the court said:
>
> 'It seems clear to us that the views expressed in Vitale v. Checker Cab Co., supra [166 La. 527, 117 So. 579, 59 A.L.R. 148], are sound, because the defense of contributory negligence arose out of the accident. But that decision does not go so far as to hold that where the defense is

purely a personal one., *i.e., minority, interdiction, coverture, or that it is contrary to the articles of the Civil Code of this state for a minor to sue his father for damages, or a wife to sue her husband in tort,* that the insurance carrier or a joint tortfeasor, who was liable in solido, has the right to interpose or urge such defenses against the claim of the minors or the married woman for damages for personal injuries negligently caused by the father and husband, respectively. * * *

'It is, therefore, our opinion that the Legislature intended to give the insurer the right to plead defenses which it could urge against the insured, *but no defenses which are purely personal between the insured and claimant, and in no way growing out of, or connected with, the accident or policy.*'

"In the case of Ruiz v. Clancy, supra, the court discussed the Edwards case as follows:

'The ruling in the Vitale Case was referred to with approval in the opinion rendered in the case of Mrs. Carmen F. Palmer Edwards v. Royal Indemnity Co. (La. Sup.) [182 La. 171], 161 So. 191. In the latter case, Miss Carmen F. Palmer, before she was married to Edwards, suffered bodily injuries in an automobile accident, caused by the negligence of Edwards, who

was driving the automobile. Miss Palmer sued Edwards for damages, and thereafter married him. On an exception to the capacity of the wife to proceed with her suit against her husband for damages for a tort, the suit was dismissed. Mrs. Edwards appealed, and, while the appeal was pending, she sued the insurance company, under the provisions of Act No. 55 of 1930. That suit also was dismissed on an exception of no cause or right of action; and Mrs. Edwards again appealed. The court of appeal affirmed the judgment in both cases. See Palmer v. Edwards (La.App.) 155 So. 483, and, on rehearing (La.App.) 156 So. 781; and Edwards v. Royal Indemnity Co. (La.App.) 155 So. 472. On the application of Mrs. Edwards for a writ of review, this court approved the judgment dismissing the suit against Edwards, and refused to issue the writ, but granted the writ in the case against the Royal Indemnity Company, and reversed the judgment. The purport of the decision was that the abatement of Miss Palmer's right of action against Edwards, by effect of her marrying him, was a matter which did not concern the insurance company, because the abatement of the action against Edwards had nothing to do with the merits of the claim of Miss Palmer, or Mrs. Edwards, against either Edwards or the insurance company. The incapacity of the woman to prosecute the suit against Edwards was

only a relative incapacity on her part, or relative immunity on his part, and did not affect the rights of the insurance company any more than it would have affected the rights of the insurance company if Miss Palmer had merely refused to sue Edwards, and had not married him. Insurance is not like suretyship, in that an insurer who pays the loss has no recourse against the insured, as a surety who pays the debt has against the principal debtor. In Act No. 55 of 1930, the insurer and the insured are referred to as being liable in solido if the insured becomes liable for a claim for damages, but, in such case, the insurer is like the principal debtor. That is one of the effects of the act of 1930, in allowing an injured party to sue the insurer alone. *The decision in Edwards v. Royal Indemnity Co., merely recognizes a distinction between a case where there is no cause of action against the insured, and hence no cause of action against the insurer, and a case where there is no right of action against the insured because of a relative incapacity of the injured party to sue the insured, or relative immunity of the insured against being sued by the injured party,* in which case, according to Edwards v. Royal Indemnity Co., the injured party may have a right of action against the insurance company alone, under the act of 1930. *With regard to the merits of a claim against an insured, the stat-*

ute does not give the claimant a right of action against the insurance company unless the claim against the insured is well founded in law. That is in accord with the language of the policy contract, and is not contrary to any provision of the statute. The last paragraph of the statute provides that, in a suit brought by an injured person against the insurance company alone, the company may urge any defenses which the company might urge in a suit brought against the company by the insured, to recover a loss which he has been compelled judicially to pay to the injured party. The Court of Appeal for the First Circuit, apparently, misconstrued this provision in the last paragraph of the statute, in Edwards v. Royal Indemnity Co. [La.App.], 155 So. 472, as this court pointed out in reviewing the decision. In the present case, the plaintiffs' petition discloses a cause of action, and they have a right of action against Christopher Lochbaum, who, by the terms of the policy of insurance, is deemed to have been the insured.'

"A study of the discussion of the Edwards case by Chief Justice O'Niell, quoted above, makes very apparent to us a wide distinction between the case at bar and the Edwards case. In the case at bar plaintiff's claim against the United Gas Company is not well founded in law, for the reason the law provides that her sole and exclusive right is to claim compensa-

tion. There is no relative incapacity of the plaintiff to sue the insured, United Gas Company, and there is no relative immunity of the insured against being sued by plaintiff. The law only defines the kind of suit she may bring against the insured, the same as it defines the kind of action that can be brought under any other given state of facts. It might be difficult to understand what the court means by personal defenses when we take the examples given in the Edwards case, to-wit: minority, interdiction, coverture, or that it is contrary to the Civil Code for a minor to sue a father for damages or a wife to sue her husband in tort.

"In Act No. 55 of 1930, the insurer and the insured are referred to as being liable in solido if the insured becomes liable for a claim for damages. But in such case the insurer is like the principal debtor, and if the claim against the insured is not well founded in law, the insurer is not liable. We are convinced the casualty company has the legal right to urge the same defense urged here by the insured, United Gas Company, and the defense is sound, well taken, and is sustained.

"Plaintiff lastly contends that it was optional with her whether she claimed compensation from United Gas Company or brought suit in tort, and that she chose the latter remedy. This contention, to our minds, is entirely without foundation in law. We might add, the plaintiff is receiving compensation weekly from de-

> ceased's original employer. She could not receive compensation from it and the United Gas Company too. And if she had claimed and received compensation from the United Gas Company it could have recovered the amount paid from deceased's original employer if he was an independent contractor. The compensation act so provides.
>
> "We are convinced the judgment of the lower court is incorrect, and it is reversed in all respects and the demands of plaintiff and intervenor are rejected at their costs." 192 So. 887, at 893-894.

In the *Dandridge* case, supra, the court recognized the distinction between a case where there is no cause of action against the insured, and hence no cause of action against the insurer, and a case where there is no right of action against the insured because of a relative incapacity of the injured party to sue the insured, or relative immunity of the insured against being sued by the injured party. In the case at bar, there is no cause of action in tort by petitioner against her deceased husband's employer or his co-employees and hence no cause of action against the insured, Pacific Indemnity Company. Accordingly, the defense asserted by Pacific Indemnity Company (the exclusive remedy afforded by Section 933(i) of the Longshoremen's & Harbor Workers Compensation Act) is a defense common to both the insured and insurer.

II.

The Louisiana Direct Action Statute is inapplicable in a case, which arises under the provisions of the Outer Continental Shelf Lands Act.

The Louisiana Direct Action Statute, Revised Statute 22:655 provides in part as follows:

> "This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana."

The Louisiana Supreme Court, in the case of *Webb v. Zurich Insurance Company,* 205 So.2d 398, interpreted this particular provision of the Louisiana Direct Action Statute and made the following observations:

> "* * * Judge J. Skelly Wright of the federal court sitting in the Eastern District of Louisiana held in *Belanger v. Great American Insurance Company*, D.C. 89 F.Supp. 736, that the Legislature by its incorporation of the 1918 Act, as amended in 1930 and the Insurance Code of 1948, as Section 14.45 intended to specifically limit 'its application to policies issued in Louisiana.' This decision was handed down in April of 1950 and the Legislature meeting the next month, adopted its Senate Concurrent Resolution No. 13 in which it recognized its

prior jurisprudence and declared in no uncertain terms that 'it was never the intention of the Louisiana Legislature in enacting Act 195 of 1948 an particularly Section 14.45 to repeal, amend, limit or in anywise restrict the application of Act 253 of 1918 as amended by Act 55 of 1930 insofar as that act provides the direct action against liability insurers on behalf of the injured person or his or her heirs. At the same session of the Legislature it sought to overcome such an interpretation to the adoption of Act 514, which amended Section 1445 by merely adding (without further change) the following sentence which is italicized in this section as it appears in footnote 14:

> 'This right of direct action shall exist whether the policy of insurance was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana.'"

It is apparent from the Louisiana Direct Action Statute and the *Webb* decision, supra, that the Louisiana Direct Action Statute is only applicable to an insurance carrier, which has not written or delivered the policy in the State of Louisiana when the accident or injury occurs within the State of Louisiana. By sworn affidavit, in the record of this case, it is affirmatively established that the policy in this case was written and delivered in Los Angeles, California. Accordingly, unless the accident which resulted in the death of the

claimant's husband occurred within the State of Louisiana there is no direct action against Pacific Indemnity Company.

There is no dispute that the accident in this case occurred on a platform on the Outer Continental Shelf. Title 33, U.S.C.A., Section 1333, the Submerged Lands Act, in no way infers that the sea bed or artificial islands and fixed structures on the sea bed have to be considered a part of the territory of the State of Louisiana. The Act simply provides as follows:

> "To the extent that they are applicable and not inconsistent with this sub-chapter or with other federal laws and regulations of the Secretary now in affect or hereafter adopted, the civil and criminal laws of each adjacent state as of August 7, 1953, are declared to be the laws of the United States for that portion of the subsoil and the sea bed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon."

The Louisiana law is to be applied only "to the extent that it is applicable." Accordingly, unless the terms of the Louisiana Statue permit application of the Outer Continental Shelf, it would appear that the federal court should not apply it in this area. Certainly, the sea bed and artificial structures are not the State of Louisiana. Furthermore, the mere fact of an accident occurring on an Outer Continental Shelf platform does not make the Louisiana Direct Action Statute applicable.

In view of the above, it is respectfully submitted that the *Webb* case, supra, supports a conclusion that the Louisiana Direct Action Statute does not apply in the instant case.

Further evidence of this conclusion that the Louisiana Direct Action Statute does not apply in the instant case.

Further evidence of this conclusion is found in the case of *Continental Oil Company v. London Steamship Owners Mutual Insurance Association,* 417 S.2d 1030, in which the Fifth Circuit Court of Appeals refused to apply the statute even though a stationary platform on the Outer Continental Shelf was involved. The following language from this decision brings to bear two problems in apply the Louisiana Direct Action Statute under these facts and circumstances:

> "On such reading the necessity for state law (in the sense of a right being lost in its absence) is not the significant factor. State law becomes merely a matter of affording some gain or benefit or advantage not available if state law cannot be invoked. Such a reading, of course, puts almost one hundred percent emphasis on the 'non-inconsistent * * * with federal laws' element of Section 1333(a)(2) — a problem which the platform owners circumnavigate by not only moving the Louisiana law out to sea but moving the occurrence back to Louisiana as though it had taken

> place on inland waters. That is a lot of fictionalizing. And in more austere words it imputes to Congress the purpose generally to export the whole body of adjacent law into the Outer Continental Shelf for automatic application to any and all occurrences *unless* — with the *unless* being limited to (a) specific provisions within the Act or (b) inconsistent federal law. By whatever characterization expressed, in determining what law is to govern, that approach accords initially a superiority to adjacent state law — the question of federal law comes into play only after this process excludes state law. This is hardly in keeping with the course of legislative history in which the motion of supremacy of state law administered by state agencies was expressly rejected."

The only inference that can be drawn from the above cited quotation is that the Outer Continental Shelf and the platforms located thereon are not included wihin the Louisiana territory. Moreover, the *Continental Oil Company* case, supra, at the very least questions the applicability of the Louisiana Direct Action Statute to a maritime matter even though the policy is written and delivered in Louisiana. On this point the Fifth Circuit Court of Appeal in the *Continental Oil Company* case, supra, stated as follows:

> "In the midst of all this traffic to which the Outer Continental Shelf Lands Act and International Convention (see notes 24 and 25) assure full, traditional freedom of the seas, it is

unthinking that Congress ever remotely considered — even for the briefest moment — that by the rare coincidence of hitting a structure located fifty miles offshore Louisiana a local, non-maritime Louisiana statute could leap this distance to subject a foreign vessel owner and are foreign, but amenable, underwriters to a suit in a Louisiana federal court even though the vessel never had been and never would trade to or from Louisiana ports. If that is so, then it would be equally unthinking to suppose that Congress meant to import an exception by allowing adoption where, by a further rare coincidence, the foreign vessel, otherwise free to sail as she pleases, happens to hit the structure while bound to or from a Louisiana port. Any such 'exception' would itself disrupt the basic underlying policy of non-interference with navigation on the high seas by making it necessary for underwriter or owner, or both, to first submit to the Louisiana Direct Action suit and then in it establish the right to the 'exception'."

Pursuant to the above cited authorities the Louisiana Direct Action Statute simply does not apply under the facts of the instant case. Furthermore, under the Louisiana jurisprudence the Direct Action Statute is a procedural remedy to enforce a cause of action rather than the creation of a new cause of action. *Finn v. Employers' Liability Assurance Corporation*, 141 So.2d 852, (1962).

III.

The liability insurance policy issued by Pacific Indemnity Company to Movible Offshore, Inc. excludes coverage for the claim of petitioners in the instant case.

The policy of insurance issued by Pacific Indemnity Company to Movible Offshore, Policy No. LAC 198700, includes as additional insureds:

> "a) Employees, corporate officers, directors . . . while acting for and on behalf of the insureds."

The insurance policy in question, is a "manuscript policy", containing numerous endorsements and insuring agreements. In this policy, at page 4, paragraph VIII are found several Exclusions of Coverage. Under these Exclusions, it is provided:

> "This policy does not apply:
>
> "(a) under Coverage A, to any obligation to which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law; (b) under Coverage A, except with respect to liability assumed by the insured under a contract as defined herein, to bodily injury to or sickness, disease or death of any employee of the insured arising out of the course of his employment by the insured, . . ."

We respectfully submit that it is readily apparent from reading the above Exclusions that there is no coverage for the claim asserted in this lawsuit due to the fact that plaintiff's deceased husband was an employee of Movible Offshore, Inc. at the time of his death and that the injuries, which he sustained and his resultant death, were caused by an accident in the course and scope of his employment, for which the employer would be liable under the Longshoremen's & Harbor Workers Act.

This identical question was considered by the Fifth Circuit Court of Appeal in the case of *Hughes v. Chitty*, 415 F.2d 1150 (1969), wherein the court stated as follows:

> "Hughes concedes that he cannot sue Employers under the workmen's compensation policy for the negligence of Canulette and Wall. He urges, however, that the general liability policy covers the negligence of Canulette and Walls. Hughes's position is based on the definition of the 'insured' in the policy. 'insured' is defined as 'the named insured * * * any executive officer, director or stockholder (of the named insured)'. Since Canulette, the operations manager of the shipyard, and Wall, a part owner of the shipyard, fit into the definition of the 'insured', so the argument runs, the policy covers their negligence. Although exclusion(s) of the policy excludes 'any obligations for which the insured or any carrier as its insurer may be held liable under any workmen's compensation law', Hughes argues that

this exclusion does not cover him since neither Canulette nor Wall is liable to him for workmen's compensation.

"This apparent loophole in the general liability policy has been closed by exclusion (g) of the policy. Exclusion (g) excludes liability to 'any employee of the insured arising out of or in the course of his employment by the insured'. Thus even though some negligence of Canulette and Wall may be covered by the policy, the policy clearly does not cover their negligence to employees of M & W. Hughes was clearly an employee of M & W who was injured in the course of his employment. He is therefore not covered by the general liability policy."

There is no distinction between the factual situation and policy exclusion provisions in the *Hughes* case, supra and the case at bar. For these reasons, we respectfully submit that plaintiff's deceased husband in the instant case was not covered by the general liability policy issued by Pacific Indemnity Company to Movible Offshore, Inc.

CONCLUSION

In conclusion, it is respectfully submitted that plaintiff has no remedy against the liability insurer of her deceased's husband's employer, save and except for Longshoremen's & Harbor Workers benefits. Additionally, the Louisiana Direct Action Statute has no application nor does it provide plaintiff with an additional

cause of action. Finally, the insurance policy issued by Pacific Indemnity Company to Movible Offshore, Inc. does not provide coverage for the claim of plaintiff due to the fact that her deceased husband met his death while in the employ of the insured, in the course and scope of his employment with said insured.

On the basis of the above and foregoing, it is respectfully submitted that the writ application of Louella S. Da'Ville, and Insurance Company of North America should be denied.

Respectfully submitted,

VOORHIES & LABBE

H. LEE LEONARD
Post Office Box 3527
Lafayette, Louisiana 70501

CERTIFICATE

I hereby certify that a copy of the above and foregoing brief has been forwarded to Relators by mailing a copy of same to their attorneys of record, Paul J. Barbier, Suite 409, 234 Loyola Building, New Orleans, Louisiana, 70112, Mr. Preston N. Aucoin, 153 Court Street, Ville Platte, Louisiana, 70586 and Mr. V. Farley Sonnier, Post Office Drawer 3507, Lafayette, Louisiana, 70501, addressed to them this __ day of June, 1973.

H. LEE LEONARD